country in a bankruptcy scenario. So they're novel claims. They are claims that were known at the time of the bankruptcy filing. The conversion right, even under the arguments that the convertible debenture holders are going to be making is known all those facts, all those provisions of the indenture that they're relying on. That was all known at the time of the bankruptcy filing. So any claims that they wanted to put this Court on notice and the debtors' estate on notice of should have been in the initial claims. Basically , when the second circuit, under the Midland Cogeneration Venture Limited Partnership versus Enron case looked at this and tried to figure out if this is a relation back situation, the Court focused on there must have been a timely assertion of a similar claim or demand evidencing an intention to hold the estate liable. Well, back when there was a bar date, that didn't happen. That was not in the vague language of, you know, "other potentially liquidated amounts." We're talking about a very sizeable claim here, Your Honor. Obviously, none of us know if it's allowed as a claim, what it would be allowed in, exact dollar amount and obviously that's not to be determined today, as we discussed earlier, but we know that it's a very large elephant as we've all said.

It is also an elephant that was in existence and known about at the time of the plan. And there is no discussion whatsoever in any of the respondents' papers about

why they didn't -- they had this delay. And furthermore they didn't even follow the proper procedure, Your Honor, for filing a late filed claim which would obviously be coming to this Court and explaining why they met the standards for excusable neglect under Pioneer and why they should be permitted to file a late filed claim or for that matter a subsequent amended, you know, on a late filed basis. And I think given that these claims should have been asserted back at the time of the filing there's really no question that these are belated claims that were knowable and should have been there. And the second circuit says when you're looking at the Pioneer test and the circumstance that you have to focus on the delay factors being the most important. Why was there a delay, was there a real reason for the delay. The second circuit in its cases, including in Midland, comments it takes a hard line on this point. And that it adopts the hard line approach. And here there just isn't any reason at all advanced -- not a single reason whatsoever advanced for the delay. I suggest to Your Honor that since the burden on the other side is to explain why they met the standards for being able to file these claims late filed, while they met the excusable delayed standards and why there's a reason for the delay and they haven't put in one piece of statement, one evidence about why. Your Honor, under that circumstances the claims have to be denied.

Even if Your Honor thought that these were just

amendments and that they really do relate back this still does not meet the standards the second circuit applied for amendments in these types of circumstances. The second circuit does look at things like the equities and the prejudice of parties. Mr. Kieselstein I think has done a very good job of explaining the prejudice that would be to the estate where we are now in this process of having all of a sudden these extremely large claims coming to the forefront and being allowed. The Court has to look at under those circumstances and consider certain things including the dilatory behavior on the part of the claimant which I think we clearly know here, whether other creditors would receive some kind of windfall if the amendment was not allowed. I don't think that this is that type of situation. Here none of the other creditors or the debtor assumed in their plan we were going to have to be dealing with these types of additionally large claims. They weren't knowable; they're not cognizable under the documents. There is obviously potential prejudice that would be to the entire estate and other creditors whose recoveries would be diminished by this and prejudice to claimants. And there's really no justification for them not being able to file this at the time of the filing of the plan.

Again, even under the test for amendments I think that they failed to justify why these claims shouldn't be disallowed even if the Court determined that they related back.

I think that they fail that test as well and therefore based on that we think that the claim should be disallowed because they're not supported by case law or the terms of the contract. They're not supportable expectation damages claims under the CalGen decision. And they are claims that should be denied on the basis that they were late filed claims or untimely claims.

MR. KAPLAN: Your Honor, Gary Kaplan from Fried Frank. We join in the arguments of the statement of Ms. Beckerman not to belabor the record. We just fully join in everything that they stated.

THE COURT: Anyone else want to be heard?

MR. DUNNE: Your Honor, Dennis Dunne from Milbank Tweed on behalf of the six percent convertible noteholders which we represent. Let me just frame the issue a bit as I see it and then I'll address Mr. Kieselstein's statement and Ms. Beckerman's arguments. But before I do I wanted to address some of the back and forth about CalGen.

I don't view us as some spawn of CalGen as Mr. Kieselstein tries to characterize us. We, in fact, were working with these noteholders prior to Your Honor's CalGen decision which I do think supports our position but this was an argument that we were going to raise regardless of the ruling in CalGen.

And that brings me to framing the issue. Because I think at its core, Your Honor, the matters are simple. Should

convertible noteholders be compensated for the loss of all their bargained for consideration or only some. And I think as we go through this it implicates kind of two key bankruptcy policies. One being the equality of treatment between a similarly situated creditors and the other is kind of avoidance of windfalls. We have a theme here that his is solvent; the equity is likely to receive meaningful distributions. So if you look at a world where you have two bondholders, one invests in a straight bond that's nonconvertible with a higher coupon. He has a tie of consideration that is principal and interest. The other bondholder elects to invest in a convertible instrument. He has a pie with three slices. He takes principal less interest and he gets this right to convert over time. And that is the key here. Because the question is all right, the debtors want to eliminate the entire pie, but they only want to pay principal and interest. So the holder of the straight bond will receive full compensation, the holder of the convertible bond will receive less than whole, maybe two-thirds, who knows what the percentage is but less than whole compensation. We think that issue is particularly acute in this case, Your Honor, where the debtor is solvent and denial of this claim in essence takes that value and that's not for today, it's for another day to determine the quantum of damages. But it takes whatever that value is and redistributes that wealth to the equity committee, who in our view, have no

cause to complain about this because it was their directors, their management team who was selected by their directors, who went out and chose access to capital markets when they did and became obligated not only to pay the lower coupon but to keep this convert right outstanding until 2014. We have a no call just like the lenders in CalGen to protect our consideration. Now, the currency of the consideration is different but the no call is designed to protect it, it protects our pot, the interest and the conversion right. Just like it protects the straight bondholders entitlement to interest over the length of the bond.

Which brings me, Your Honor, to I think the limited scope of today's hearing. It really is, is there liability, is there a breach of contract claim that is allowable as a result of the aggregation of the conversion right? It is not amounts. A lot of Ms. Beckerman's comments can go to amount. But we have to discount the likelihood that you would ever actually convert. Those are things we can hear experts testify on. We've retained Dr. Hull, a professor at the University of Toronto who has literally written a book on how you value, converts and options. And this is not some ivory tower esoteric analysis, this is how these instruments trade every day and which is the value of what our clients were receiving. The procedural posture here, Your Honor, is on March 27th we did file a supplement to the proof of claim. I'll address the

alleged lateness at the end of -- end of my arguments. But it's clear from Mr. Cieri's comments at the outset that that predated by months their filing of the Waterfall plan which incurred may not be the plan they proceed with because they are not seeking a plan sponsor reorganization plan. Ultimately, Judge, the debtors don't dispute several key aspects of the converts. I don't think they dispute that they obtained a lower coupon in exchange for the granting of the convert feature. I don't think they dispute that it was a fundamental aspect of the bargain for consideration. What they dispute is whether they have to pay anything for it if they eliminate it even in the context of a solvent case when equity is receiving meaningful distributions. And I -- I have to harp on one point here, Your Honor, which is we do have an unusual convertible feature which is very often you'll see a convertible bond that requires the bondholders even pre-bankruptcy to take their debt and use that as currency to get the stock. So that you never have a situation where they received cash for their principal and interest and get the stock. They either get cash, principal and interest or they convert and have their entire claim satisfied with stock, that's not our indenture. Our indenture expressly provides that when we convert we receive cash for principal and interest and there's a formula that basically says okay, at the time you convert it how much above the strike price was the stock trading at. And that delta is

then treated through the distribution of stock. And the noteholders have made it clear on that, Your Honor, that we're willing to live with that option through 2014. We're not looking for the elimination of that option solely to run it here and try to quantify it and make the claim we suggested to the debtor that we should replicate that, reinstate it, do something and we'll take the risk that it's never in the money. They've said that's unacceptable. We want to cash all the creditors out, we want to lower the burden of cashing it out and we'd like to do that by eliminate your convert right and not compensating you for it.

Now, Your Honor, let me just return to some of the key points that I think they've missed. The key nature of the convert is the duration. It is not capable of being eliminated on any particular day. We have the right to decide at our economic discretion what day to convert from now to 2014. We have a no call in the document to make sure that the debtors can't force us to take principal and interest. The debtors make much of the notion that there's a quick right, that if there's a change of control the --

THE COURT: You mean, you can exercise right now and join Mr. Kaplan's group, is that what you're saying?

MR. DUNNE: We could.

THE COURT: Okay.

MR. DUNNE: Though, we can't be forced to do it.

There's a difference between a foot and call which is key here. We could do it but they can't force us to do it. We have a right to see how this plays out to 2014 and then decide whether to join.

THE COURT: Mr. Kaplan might be upset because then you delude his group.

MR. DUNNE: He might be but as I said it's his agents, his directors that actually negotiated this deal. He can't complain about it. He may be upset but he can't complain about it. The key element is duration, Your Honor. The fact that there's massive vol --

THE COURT: All of these are with a very wide paint brush because you're going to say his directors, and it may very well be that his clientele came into existence two days ago.

MR. DUNNE: No, but it's clear. And I'm glad to brief this issue, Your Honor, that there are many cases that say in a solvent debtor when you are talking about allowing claims, equity cannot be heard in many circumstances when you're looking to allow claims that would give creditors the full benefit of their bargain. Because it was the directors. I agree with you, secondary markets they may have traded in and are out, they may not be the same people who voted in 2004 for that slate of directors but they have no cause to complain.

The key element, Your Honor, is duration. If you

look at -- any court that has looked at Black-Scholls or Jump-Diffusion or some of these other models other than this intrinsic value model that they presuppose is the right test, has rejected the intrinsic value model because you can't force us. With the no call and the other protections you can't force us to put up or shut up today. We have the right to either have an extent to 2014 or be compensated for that loss.

Which brings me to the next key point which is acceleration maturity does that move from 2014 to 2005? On that a couple of points. I believe these are the same points that came up in CalGen and in the make whole where they basically said you know, this isn't a call in CalGen because post maturity you don't call it you just pay principal and interest that's due at maturity. So how could there be a breach of the no call where we've actually metaphysically, I don't know how, but we've actually past the maturity date. And that did not prevent Your Honor from ruling, correctly I believe, that there was an expectation with the no call that that bucket of consideration would survive to the light of the security and you would need to be compensated for it. Textually what they miss -- their whole argument is off of a form exhibit to the indenture, the form of note, which on it's face says "to the extent that there's any inconsistency between the note and the indenture in the terms the indenture provides." There's also nothing in the form of note that says

maturity is moved up from 2014. He has to resort to not only expert textual evidence but Black Law dictionary. So no contemporaneous evidence that they meant anything other than 2014 by maturity.

But let's talk about some of the inconsistencies that would exist if you adopt their arguments, one of which we've talked about. Which is we've expressly had and preserved and bargained for the right to convert post default in the indenture. That was there for a reason so that we couldn't have this rush of maturity date or defaults that would deprive us of that option value. The other is that the indenture is unambiguous, that we have the right to convert, among other things as a number of triggers, but one of the triggers is that anytime after September 30, 2013. It doesn't say unless maturity has been moved up, it is unambiguous. If you accept their reading we have an inconsistency which I submit is resolved by the face of the note that says in terms of the indenture provide and to prove why I don't think that Mr. Kieselstein wants this reading is we have OID in these notes, we have original issued discount in these notes. And the note also has on the face of it a statement that says "principal amount of maturity equals 725 million dollars." The accrued amount on the petition was 547 million dollars without, unless you accept Mr. Kieselstein's argument that the maturity was moved up. In which case the claim will increase by 175 million

dollars as a result of saying okay, that's what the document says. Principal amount of maturity is the amount stated on the face of the form of note, 725 million dollars. I don't believe that's the case, Your Honor, because it's proving the absurdity, I believe, of this textual analysis.

Which brings me to a related point. Ultimately, Your Honor, their whole argument assumes that they can elect our remedies. And the cases that have considered the election of remedies, particularly the acceleration context, require an affirmative act by the noteholders. The put is a perfect example of it, they make much of this notion that were there a change of control outside of bankruptcy, we the convertible noteholders, would have a right to put the securities for principal and interest to the company and they would pay us that amount with nothing for the convert. They're actually wrong a little on the indenture because within certain parameters we actually cannot do that because it converts valuable. But put that aside that's a put, it's again our election. I agree that we have the right after a default, pre-bankruptcy let's say to go to state court and try to have this obligation satisfied by payment of principal and interest. But that's not what we did. And only that would constitute an election of remedies sufficient to say you're not compensated for your loss of consideration. They are trying to conflate the two by saying okay, the petition date's acceleration, it's

election of remedies and it's maturity date. And (a) those arguments were made before and I believe you rejected them and there's just no evidence of that in the indenture. The seventh circuit in the LDH case made an important point out of this where they denied a prepayment premium to the lender who had exercised remedies. The debtors cite this case because of the fact that the prepayment premium was denied but it was because they tried to exercise their remedies. They elected to lift the stay to foreclose on their collateral. Again, whatever they got pursuant to state court remedies. New York law is the same, Your Honor. New York Supreme Court has held that the acceleration of immediate payment to the exclusion of other rights "could be brought into being only by an election to accelerate affirmatively exercised by the plaintiff obligee. Any other holding would take the option of accelerating or not accelerating away from the person for whose benefit the clause is placed in the contract in the first place. That's the Simonim case.

Your Honor, let me just turn now to this argument about 502(b) for a second and whether or not we look at just the petition date to see whether the conversion right is in the money right or not. That's not what 502(b) says. It doesn't say that you adopt some intrinsic value task. I think it's not an issue for today because that's really quantum of damages. What they're saying, Judge, is yes there may be liability but

let's look at it on the petition date and let's set it at zero. I submit, Your Honor, that's precisely why we should take that into account and move it to an evidentiary hearing where you can have the benefit of hearing from Dr. Hull on this. It also leads to some absurd ramifications. Let's assume, Your Honor, that on the petition dates our strike price is three dollars and eighty-five cents compared to what Calpine stock was trading at which was much south of it, would lead you to say you know, I don't have to give you the money on that date even though the indentures say I can't price you out on any given day I'm going to do it.

What if Calpine stock at confirmation was trading at ten dollars a share, is that still an argument that anybody with a straight face would submit that you would then take that value that otherwise is contractually owed to us and give it to the equity. To say, yeah, 502(b) works that kind of windfall for junior classes. There is no evidence that it does that. Indeed, we all know that there are a number of exceptions to 502(b). 502(b) also says that if you don't get unmatured interest, you don't get post-petition interest. But we all know that what you do in a solvent debtor that there are a lot of situations where 502(b) simply does not operate to dictate that you put blinders on as of the petition date. Think of a landlord who had a below market lease on the petition date, two years later it's rejected. Would anybody contend that you

could prove up that that loan had no lender had no damages because you have blinders on at the petition date and you say, you know what, the market was pretty good on the petition date. You therefore -- I know you can't actually mitigate now but you have no damages.

THE COURT: This is all conjecture, Mr. Dunne.

MR. DUNNE: No. It's the --

THE COURT: I've read all of your papers. Do you have anything that you don't have in your papers?

MR. DUNNE: One last point because I think I also don't mean this which is on the petition -- one of the key elements of valuing the conversion right as duration as I've talked about, we go to 2014. As of the petition date that's nine years. As of today that's only seven. One of the key drivers of value under a Black-Scholl's model is how long does that option have to run. I don't believe that the debtors truly believe that to give us an extra two years on a Black-Scholl's model.

Which brings me to a recent Delaware case, Your Honor, July 20th of this year. It's Lillis v. AT&T, 2007 WL 2110587. Where the Delaware Chancellery Court was faced with the issue of whether stock options that were being eliminated as part of an extraordinary transaction, in that case an acquisition through a merger, where the merger price was below the strike price of those stock options. And the argument was

exactly what the debtors and the other objectors are contending here, that look you're out of time, you're out of luck, too bad so sad, your strike price is above the merger price no damages. The Delaware Chancellery Court said no, because that's not how you value that option. You have to look at the remaining duration and they adopted a Black-Scholl's value to determine the damages from the loss of that stock option. So for purposes of today, Your Honor, I submit that that's sufficient for you to hold that there's liability, we'll come back and we'll talk about damages.

Let me address subordination of the 510(b), Your Honor. A couple of points here. I don't think anybody can ask that compensation for your key bargain for consideration is within the ambit of 510(b). And by that I mean 510(b) originated to deal with fraud under the securities laws. The language of it is broad, we all know that, we know how far the cases have gone. But none of them have said you know what, the failure to pay your coupon, the failure to pay your interest is 510(b), because those are damages arising from the purchase or sale of the security. Going back to the pie analogy, Your Honor, that's why it's not 510(b). Because a straight bondholder has principal and interest, we have principal, interest and the conversion right which are all three buckets of key bargain for consideration. They had a no call where they could not eliminate or otherwise call us of principal and

interest. They could not eliminate that conversion right prematurity. So the compensation for the breach of those covenants and promises are key buckets of our consideration and not 510(b). A point that I don't think that the debtors dispute.

The point about equity risks. There are cases and we cite them, this is not an equity security, not defined in the bankruptcy as an equity security. Indeed, the securities law defines it differently. But for our universe of applicable law it is not an equity security, it also is not one where we have the risk that the cases talk about in 510(b). Why, because our principal and interest is not at risk. We have the debt, this is only an exchange for a lower coupon rate. We agreed to take that interest in the form of the conversion right. But unlike equity holders who put their dollars in and they never get their dollars out, they remain equity. We had the debt and it was never at risk. And I won't go through the cases, Your Honor, but they're in our brief.

The last point, which is similar to the make whole and the CalGen. I don't think the argument that it was 510(b) there, that the make whole or the CalGen compensation for the breach of the no call was somehow subordinateable under 510(b). But it is not. Ours is exactly the same, Your Honor. Our argument is that we are being compensated for direct consideration we bargained for that they are choosing to

eliminate completely under the plan. One last point on this. A lot of the cases that are cited throughout the briefs are not that relevant on 510(b) given where we rank, if you accept that it's 510(b). Why? Because a lot of those cases, the general unsecured class, was the last class case on the vine. So whether or not those courts dropped them right below the unsecured creditors carry with equity holders, somewhere else, it didn't really matter because there was no skin in the game. I think that the code is clear that even if it is 510(b) given the definition of equity security which expressly excludes converts we would be classified immediately junior to the general unsecured claim but senior to the equity.

The last argument, the late file proof of claim. The original proof of claim filed last August, Your Honor, stated that the debtors are obligated "for any and all other amounts due or to become due under the indenture and the six percent convertible notes whether now due or hereafter arising which amounts may be unliquidated or contingent may become fixed and liquidated in the future." Here the contingent claims the elimination of the conversion right under the plan constituting another breach of the contract. We also had a stipulation that was entered by Your Honor in January which allowed the principal and interest of the convert noteholders' claims and expressly said we will reserve any litigation on contingent claims for the plan process or the claim reconciliation

process. Which Your Honor, is precisely where we are now I submit. What we did after we were retained was ask the indentured trustee to clarify with detail, anticipating that they would make this argument which we think should not prevail, the clarification that they are -- if and to the extent they seek to eliminate the conversion right, we need to be compensated for that. Your Honor, they have put on no evidence today about prejudice, everything is to the contrary. They clearly knew about our claim in March of 2007, three months before the filing of the plan. In May of 2007 I believe Mr. Kieselstein stated to Your Honor that they were on track for filing a plan by June 20th, there were discussions with convertible noteholder groups about potential resolution of their claim for the loss of the future right to convert. But that they were still on track. Clearly, no prejudice. They put in no affidavits, produced no testimony or witnesses to prove up prejudice. And now we hear, despite the conclusory statements that plan negotiations were at an advanced stage in March, we're hearing that they're in the middle of a search for a plan sponsor who would raise capital and inject equity investments to cash out all the unsecured debt and provide a fixed recovery to the equity. I submit, Your Honor, that that belies the notion that they were in advanced stages of negotiating base.

The Enron case -- Your Honor, I want to point out one

factual distinction there. The second circuit (a) recognized that amendments, which I don't think this is, it's a supplement clarifying the proof of claim but that amendments are clearly allowed. But in Enron the facts dealt with new debtors, they were guaranteeing claims that were being filed against other debtors. So the original proof of claim was again one debtor but the guarantee claims had they been filed against other debtors so there was no -- there were clearly completely new proofs of claim against different debtors. Who, when you ran their claim register did not show any proof of claim with respect to the debt amounts.

A couple of last points. Your Honor, disallowance --

THE COURT: Just one.

MR. DUNNE: Okay. One.

THE COURT: You've gone way over anybody's allotted time here.

MR. DUNNE: And this goes to the proof of claim at insolvency. Equity here would gain a windfall by the disallowance of this proof of claim. And I submit, Your Honor, that as a result even if it was an untimely late filed proof of claim that otherwise shouldn't be allowed, insolvent estate late filed claims are. Section 726 says that in a liquidation that late filed claims have priority over distributions to the debtor and equity. Under 1129(a)(7) the best interest test says that a plan fails if we would do better in a hypothetical

Chapter 7 liquidation than we would under their plan. That's the reason frankly why post-petition interest is frequently paid insolvent cases, because you have a best interest test. If you look at where post-petition interest is slotted in at 726 it's actually below late filed claims. So I -- particularly at this case in a solvent estate I don't know what we're arguing about, Your Honor. And with that unless Your Honor has further questions?

THE COURT: I have none.

MR. HANSEN: Your Honor, I'll be very brief. Kris Hansen with Stroock & Stroock & Lavan on behalf of those certain seven and three quarter percent convertible noteholders. We agree completely with Mr. Dunne's comments. You read our papers, we have everything in the papers, Your Honor. I do want to point out for the Court that the language in our indenture Section 10.15(d) that Ms. Beckerman referred, that Mr. Kieselstein referred to, I want to read a little bit of language for the Court because people glossed over it a bit and it's critical to the analysis here. Because our view is it defeats the arguments on acceleration, the arguments on 502(b) and then earlier in that provision the arguments with respect to whether you have a traditional converter you have what's here a contingent converter. 10.15(d) states "if an event of default as set forth in Section 5.1(e) or (f) of the original indentures," and those are bankruptcy events of default so the

seven and three quarters were specific. So basically "in the event of a default based upon bankruptcy has occurred and is continuing, past tense, the company may not pay cash upon conversion of any notes and instead will make payment only through the diluted shares of common stock." We think that's critical because the other parties here have come to you and said Your Honor, we don't really know exactly what it says. It can't be harmonious with the concept of if you have an event of default the maturity date is brought forward and therefore you no longer have the conversion right. And so our read of this even though it doesn't say it is that it must just be that unique circumstance where you had a right to convert before the bankruptcy and you will then take your form of consideration after the bankruptcy has been filed. That's not what the provision says, the provision talks temporally it uses specific language. And I would note that unlike some of the other ones, the Model T indentures for example in CalGen etcetera which might have been based on ancient forms, these were negotiated two years ago, this was dated June of 2005. And so the intent of these documents could be ferreted out to the extent that if people don't think it's clear, we can have a further indentured hearing on it.

But for today's purpose it says if that event of a default, the bankruptcy default, has occurred and is continuing the company may not pay cash upon conversion of the note.

Thereby stating pretty clearly that the conversion of the note can take place in the post-bankruptcy context and eviscerating all of the arguments laid out before you with respect to well, gee Judge, you have to evaluate it at 502(b) as of the date of the petition. And gee Judge, you have to look at this acceleration decision and say hey, it's gone. It's not gone, it expressly survives under our document.

And the only other point I'd make, Your Honor, because we have gone way over with all these arguments is when you look at Section 10.15(b) of the seven and three quarter percent indenture it states clearly that these bonds upon conversion, and again, Mr. Dunne explained it, if you're in the money provides you both the cash recovery and the conversion right. We're not asserting that it's two legally distinct claims that we can strip off from one another and go out into public market places, strip it out and sell it, and then we should have had a recovery for this piece and a recovery for that piece. We're saying to you that it's one claim but it's two forms of consideration with respect to that claim under the terms of the indenture. And if you're going to take that right away from us, just like that right was taken away with respect to the CalGen holders that we should be compensated for it from a breach perspective. And I leave it at that, Your Honor.

MR. FREDERICKS: Ian Fredericks with Young Conaway Stargatt & Taylor on behalf of Manufacturers and the Trader's

Trust Company as indentured trustee. I rise only to say that I join in both Mr. Hansen's statements and adopt them for the reasons they said. I respectfully request that you overrule the objection. Thank you.

MS. REID: Your Honor, Sarah Reid of Kelley Drye & Warren on behalf of HSBC Bank as successor indentured trustee to the six percents and also for the 4.75 percent contingent convertibles. I do join in the arguments of Mr. Dunne and Mr. Hansen and respectfully request that you overrule the objection. I would, however, ask that whatever decision the Court makes the Court gives the party an opportunity to review any order because the one that was proposed by the debtor obviously was wrong in my view in terms of the law. If that were to be related to what Your Honor rules we would have some serious problems because it goes beyond those sections. Thank you, Your Honor.

THE COURT: Anybody want to be heard in response?

MR. KIESELSTEIN: Your Honor, we'll rest on the prior statements.

THE COURT: Very well. I guess, you're waiting to hear from me. Calpine and it's affiliated debtors seek the entry of an order granting the debtors' limited objection pursuant to Section 502 of the Bankruptcy Code and Bankruptcy Rule 3007 to claims filed by the holders of certain unsecured convertible debt. The noteholders for that convertible debt

object.

Between 2000 and 2005 Calpine issue four series of unsecured convertible notes. As of the commencement of these Chapter 11 cases on December 20, 2005, the petition date, convertible notes were outstanding in the aggregate principal amount of approximately 1.8 billion dollars and consisted of approximately 1.3 million dollars four percent convertible senior notes due December 26, 2006, 547 million dollars six percent contingent convertible senior notes due 2014, six hundred and fifty million dollars 7.75 contingent convertible senior notes due 2015 and 634 million dollars 4.75 contingent convertible senior notes due 2023.

Generally, the convertible note indentures provide that prior to maturity the holders may convert the notes into cash and/or common stock. Upon the occurrence of one of a number of conditions precedent. As long as no event of default has occurred and provided one of the conversion conditions has transpired converting holders of the 4.75, the six percent and the 7.75 percent notes are entitled to receive (a) repayment of principal in cash and (b) payment of any upside different between the applicable conversion price and Calpine stock price in shares of Calpine common stock. Whereupon conversion the stock price is lower than the strike price the holders are not entitled to full repayment of the principal and may only receive their conversion value in cash. The indentures provide

that commencing a Chapter 11 case constitutes an event of default. Upon an event of default all notes shall be "immediately due and payable" without any further action or notice by the trustee or holders. The debtors filing their Chapter 11 cases constituted an event of default under the notes indentures thus rendering the notes due and payable immediately. None of the conversion conditions were satisfied on the petition date. By order dated April 26, 2006 this Court established August 1, 2006 as the bar date for filing proofs of claim.

On or about July 19, 2006 Wilmington Trust Company, as indentured trustee for the 7.5 percent notes, filed a proof of claim asserting claims for (a) principal and interest and (b) other unliquidated charges. On or about July 27, 2006 HSBC Bank, as successor indentured trustee for the four percent notes, the six percent notes and the 4.75 percent notes filed two proofs of claim asserting similar claims including "other unliquidated amounts." In connection with the four percent notes and the six percent notes and the 4.75 percent notes no mention was made in the original proofs of claim of any claim by virtue of any loss of a conversion right.

On January 5, 2007 the debtors and HSBC entered into a stipulation and order whereby the Court approved on January 30th pursuant to which the parties stipulated to allow claims amounts for the principal and pre-petition accrued interest due

on account of inter alia each of the four percent notes, the six percent notes and the 4.75 percent notes. The parties reserve for a later date the determination of the appropriate rate of post-petition interest. On March, April and May of 2007 the indentured trustees for the convertible notes filed "supplemental" proofs of claims seeking in addition to repayment of outstanding principal and accrued interest damages for "any breach" of the conversion rights, collectively the new claims.

On June 20, 2007 the debtors filed their plan and disclosure statement and under the most likely scenario with midpoint valuation and midpoint claims the debtors proposed to pay the noteholders the full amount of their principal and accrued interest as well as post-petition interest thereon at a rate to be determined by the Court together with reasonable pre-petition indentured trustees fees as provided for under the indentures pursuant to the plan.

The debtors object to the new claims first on the basis that they were not timely filed. To the extent this Court allows the noteholders to pursue their new claims the debtors would also object to the new claims to the extent they seek payment beyond principal and interest. The official committee of unsecured creditors and the official committee of equity holders join in the debtors' objection to the new claims. Are the new claims timely or untimely? The

noteholders filed their new claims approximately eight months after the bar date without first seeking Court approval. The noteholders argue that the new claims are not new claims but rather amendments to the noteholders original claims, I disagree. First, the new claims are not amendments because they do not relate back to the original claims. A claim relates back to a timely filed claim if it "(1) corrects a defect of form in the original claim, (2) describes the original claim with greater particularity or (3) pleads a new theory of recovery on the facts set forth in the original claim." See Midland Cogeneration Venture Limited v. In re Enron, 419 F.3d 115, 133, (2d Cir. 2005), U.S. v. Kolstadt, 928 Fed 2d 171, 175, (5th Cir. 1991), "amendments to do not vitiate the role of bar dates. Indeed, courts that authorize amendments must ensure that corrections or adjustments do not set off wholly new grounds of liability. Courts must subject post bar date amendments to careful scrutiny to assure that there was no attempt to file a new claim under the guise of amendment," In re Enron Corp., 419 F.3d at 133, citing In re Integrated Resources, 157 B.R. 66 and 70 (S.D.N.Y. 1993). "A claimant asserting relation back bears the burden of proof," In re Enron Creditors Recovery Corp., 2007 W.L. 175, 653 at 5, (Bankr. New York June 13, 2007.) No application was ever made to this Court to bring before this Court the opportunity to pass on these amendments or alleged amendments.

Here the new claims do not correct a form defect in the original claims, they do not describe the original claims with more particularity and they do not plead a new theory of recovery on the facts set forth in the original claims. Instead they assert entirely new claims seeking in addition to 100 percent of the principal and interest due under the notes a double recovery based on conversion rights, See Ameritrust Co. v. Integrated Resources, 157 B.R. 66, 72 (S.D.N.Y. 1993), "The record contains evidence that the appellee's banks amended proofs of claims seek no interest in the amount of priority in the bank's original claims. This factor alone goes to support three of the five factors that need to be considered when balancing the equities."

Moreover the initial claims did not make any meaningful reference to the conversion claims, See Enron 419 F.3d at 143, whereas the Court must determine "whether there was a timely assertion of a similar claim or demand evidencing an intention to hold the estate liable." In Re Asia Global Crossing Ltd., 324 B.R. 503, 508, 509, (Bankr. S.D.N.Y. 2005) disallowing late amended claims because among other things the initial claim asserted only a general damage claim and did not provide notice of an amended claim. Although the noteholders have not quantified the new claims the debtors have been led to believe that the amounts claimed could be in the hundreds of millions of dollars. In addition, the noteholders waited

nearly eight and in some cases ten months after the bar date to file the new claims which to the extent they are cognizable at all existed on the petition date. See Enron 419 F.3d at 128, "in determining how long is too long, Courts generally consider the degree to which in the context of a particular proceeding the delay may disrupt the judicial determination of the case." The noteholders offer no excuse for this delay which has disrupted the judicial administration of the case in multiple ways. First, the noteholders filed the new claims doing the debtors' formulation of the plan and second, the timing of the new claims forces the debtors to deal with them when they should be focusing on the approval of the disclosure statement and confirmation of the plan. See Enron 419 F.3d at 122 citing Silivanch v. Celebrity Cruises, Inc., 333 F.3d, 355, 368 (2d Cir. 2003), "we and other circuits have focused on the third factor the reason for the delay including whether it was within the reasonable control of the movant."

In addition, as already noted the noteholders have led the parties to believe without specifically setting it forth that the amount sought under the new claims would be substantial and in the hundreds of millions of dollars. Indeed they concede that the claim or claims are elephantine in size. To the extent the new claims remain unresolved and unliquidated as of confirmation the reorganized debtors may have to maintain large reserves thereby delaying distributions to other

stakeholders who've timely filed proofs of claims and interest. In addition to being time barred the new claims are without merit. A convertible debenture is an indivisible unit. The issuer has but one obligation to meet either redemption or conversion, it can never be required to do both. See Chock Full O'Nuts v. U.S., 453 F.2d, 300 (2d Cir. 1971), likewise the convertible notes debentures do not provide for recovery on account of both debt and equity interest. Instead like all convertible debentures the convertible notes provide the security of a debt instrument but allow the noteholders to benefit from any future upside by converting their notes to cash and common stock. Once the noteholders have converted their notes, however, they no longer hold debt interest to the notes that have been converted. Accordingly, the convertible noteholders cannot possibly be entitled to receive payment of their debt and damages on the account of a conversion right. See 11 U.S.C. 1129(B)(1)(b). See also Chock Full O'Nuts, 453 F.2d at 304, "convertible debentures provide for two mutually modes of satisfaction." By repaying the noteholders principal accrued interest in full the debtors are rendering the alternative performance as provided in the indenture. See Chock Full O'Nuts, 453 F.2d at 304, "the alternative to conversion is that the issuer will redeem the debenture or pay it at maturity. In which event the conversion privilege will be terminated." Moreover, the conversion rights were not

exercisable as of the petition date when the notes were accelerated and matured. And thus the noteholders do not have allowable claims with respect to the conversion rights, See 11 U.S.C. 502(b), a claim filed against the estate must be determined "as of the date of the filing of the petition." In re Einstein Noah Bagel Corp., 257 B.R. 499, 507 (Bankr. District of Arizona 2000.) At the time the case was filed the right to receive cash would not have yet matured because the put right itself had not yet become exercisable.

Lastly, even if the new claimants were cognizable they would be susceptible to subordination pursuant to Section 510(b) of the bankruptcy code as claims arising from the purchase or sale of a security if the debtors. See Rembroe v. Dufrain, In re Med Diversified Inc., 461 F.3d 251, 259 (2d Cir. 2006), "because of the binding agreement between the parties to turn a debt into an equity interest it is reasonably clear that Rembroe's claims was in line with policy concerns underlying Section 510(b)" See in Re Enron Corp., 341 B.R. 141, 162-63 (Bankr. S.D.N.Y. 2006) "dealing with subordinating claims arising from ownership of employee stock options and concluding that the broad application of Section 510(b) is now quite settled." In re BT1 Communications, 304 B.R. 601, 608 (Bankr. E.D.N.Y. 2004), "holding nothing in Section 510(b)'s text requires a subordinated claimant to be a shareholder."

In conclusion, for the reasons just set forth the new

claims were filed after the bar date and accordingly are time barred. Even were the new claims were to be allowed as timely amendments the claims for damages on account of the conversion rights under the indentures would be disallowed or at best subordinated. The four percent notes have already expired by their turns and could not be entitled to conversion right damages under any theory. Accordingly, the debtors' limited objection to the new claims is granted. Settle an order consistent with this decision.

MR. KIESELSTEIN: Thank you, Your Honor. I've given counsel's comments regarding the order. We'll puddle and submit and order to Your Honor as soon as possible.

THE COURT: Very well. Do you have anything else?

MR. SELIGMAN: Your Honor, the only matter that we have left on the agenda was an initial conference with respect to the Rosetta adversary. We would like to take that up in a chambers conference.

THE COURT: Sure. We'll do it in chambers after the call.

MR. SELIGMAN: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 1:21 p.m.)

I N D E X

R U L I N G S

I N D E X, cont'd

R U L I N G S

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CERTIFICATION

I, Lisa Bar-Leib, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

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